UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAHAINA-MAUI CORPORATION, a California corporation, Appellant, v. PH TAU TET HEW and HELEN NA HEW, husband and wife, GE TAN and SHIZUKO RUTH husband and wife, Appellees.	NO. 20419 APPEAL FROM SUMMARY JUDGMENT GRANTED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII Chief Judge Martin Pence

BRIEF FOR APPELLEES

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LAHAINA-MAUI CORPORATION, a California corporation, Appellant, v. EPH TAU TET HEW and HELEN ONA HEW, husband and wife, RGE TAN and SHIZUKO RUTH , husband and wife, Appellees.	)	NO. 20419 APPEAL FROM SUMMARY JUDGMENT GRANTED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII Chief Judge Martin Pence

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

Appellees concur in the jurisdictional statement the Appellant.

STATEMENT OF FACTS

On June 30, 1965, judgment was entered against Appellant on the Appellees' motion for summary judgment er Rule 56 of the Federal Rules of Civil Procedure 119-121). The court below found that there was no uine issue as to any material fact and stated in its ision that it relied upon the language of the alleged tion to Lease", the Complaint, the Answers (presumably to Complaint and the Interrogatories), and the Notice of

rcise of Option of Lease for its decision (R:110).

Appellant did not file an opposing affidavit 120). The court below had before it the pleadings and ibits attached thereto, the depositions of Paul T. F. Low Philip H. Ching, and the Appellees' Answers to the Appel-t's Interrogatories (R:120). Appellant's statement is omplete and misleading, and therefore Appellees will iew certain undisputed facts that were before the court ow.

On February 14, 1963, the Appellees and the ellant's predecessors in interest engaged in informal cussions in Lahaina, Maui, State of Hawaii, relating to purchase of approximately 144,192 square feet of Maui ch property owned by the Appellees in Lahaina (R:2-3,44).

On the morning of February 15, 1963, the Appellees w to Honolulu for further discussions of the purchase and possibility of leasing this Maui beach property 3,44,77, Dep.Ching p.4).[1/] Appellees, not experienced in

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[1/] Appellant states on page 3 of its Brief that on this date the negotiations were "completed for the lease". This is inaccurate, on the record, since the Appellees at no time have ever conceded that negotiations were ever completed to the extent that a meeting of the minds had been reached as to the terms and provisions of the proposed lease. However, on the present record, no genuine issue of any material fact arises because the court below, in effect, assumed for the purposes of its decision that negotiations were completed and that no contract resulted or could result from the alleged option and its alleged acceptance alone (R:105-107); A fortiori, if negotiations were not completed and there remained essential terms to be agreed on, then clearly the Appellees were entitled to summary judgment.

leasing of real property (R:92), were not represented by
nsel at either of the meetings (R:80) although during the
olulu meeting, the Appellant was represented by a member
the local bar (Dep.Ching p.2-8). It was this member of the
(acting under the directions and instructions of the
ellant's predecessors in interest) who hurriedly drafted
paper entitled "Option to Lease" (R:3,44, Dep.Ching p.5,10).

The document granted to the Appellant an "exclusive
on to lease" the above mentioned Maui beach property (R:8).
llees understood that this grant prevented, during the
of the "exclusive option", the Appellees from negotiating
ease with any other person (R:84).[1/]

An essential and material provision of the "exclusive
on" is the following:

> "Said lease shall contain the standard provisions normally contained in a lease for similar property situate in the State of Hawaii together with the provision that the Lessor shall subordinate their fee to permit the Lessee to obtain financing which provision is by way of example, but not by way of limitation." (R:9)

A proper subordination provision in the lease was basic
essential to enable the Appellant to obtain for the
fit of both lessor and lessee the proper financing
a proposed 2-3 story, 200 unit "combination
tment hotel" project costing between $1,000,000 and

1/ This is the obvious conclusion from the use of the word "exclusive" in the alleged option.

00,000 (Dep.Low p.9; Dep.Ching p.14,27,29). It was con-
d by the attorney acting for the Appellant at the time
he negotiations, that a subordination provision in a
iian lease is not a standard or usual provision (Dep.
g p.7,16).

On April 22, 1963, the Appellees extended the term
he exclusive option to August 1, 1963 (R:4,44-45).

Between February 15, 1963 and July 25, 1963, a
e was prepared by Mr. Dwight Rush, a member of the Hawaii
(Dep.Ching p.23). This lease was sent to California but
never submitted to the Appellees (Dep.Ching p.23).

Prior to July 25, 1963, the Appellees hired Mr.
ard Mirikitani, a member of the Hawaii bar, as their
rney (R:80). On or about that date, Mr. Frank Nunes from
California law firm of Nunes & Crews, Hayward, California,
onally delivered to the law offices of Mr. Mirikitani an
ecuted lease (R:13-36,85). This second lease contained
isions which are neither standard or usual provisions
ally contained in Hawaiian leases (R:4-5,45). The proposed
ors named in this lease were the Appellees (R:13), and the
osed Lessee was the Appellant (R:13). The lease was for
same term mentioned in the alleged option (R:8,13), at
same annual rental (R:8,13-14) with, however, a provision
iring the Appellees to join in a mortgage or deed of

---

he California lease tendered by the Appellant describes
he project as a "hotel or garden apartments" (R:24-25).

st securing a loan in a sum not exceeding ninety per
t (90%) of the value of the land and improvements (R:22).
s lease contained an option to purchase (R:32-33) which
not mentioned in the alleged option yet apparently was
cussed on February 15, 1963 (Dep.Ching p.24).[1/]

On July 26, 1963, the option was assigned to the
ellant (R:5,45) and on this same date the Appellant pur-
tedly exercised the alleged option by signing and
ivering to the Appellees a "Notice of Exercise of Option
Lease" (R:5,45).

On August 1, 1963, the alleged option expired
10).

On August 23, 1963, the Appellees formally advised
Appellant's local attorney that since no agreement had
n reached with the Appellant, the Appellees considered
alleged option null and void and tendered the "exclusive
ion" payment made by the Appellant (R:5,6-45).

On August 29, 1963, the complaint was filed
1a-39). On September 11, 1963, the case was removed
the United States District Court for the District of
aii (R:40-42). On October 21, 1963, the Appellant filed
answer and counterclaim for specific performance (R:43-66).
exed to this counterclaim was a third proposed form of lease
pared by the Appellant (R:47-66). Appellant alleged that

1/ Other examples of 'non-standard' provisions included in this lease were an extension clause and an arbitration clause (R:29-30,32).

s form of lease complied with the terms of the alleged
ion (R:46).

On October 25, 1963, the Appellant filed its first
ice of lis pendens (R:67-72). On November 16, 1964, the
ellees filed their amended reply setting forth the affir-
ive defense of the failure of all the documents to comply
h the Statute of Frauds, Chapter 190 Revised Laws of
aii 1955, as amended (R:96-98).

On January 5, 1965, the Appellees filed their
tion to Dismiss Counterclaim, or in the Alternative,
ion for Summary Judgment" (R:99-101). After the hearing
the motion the court below ruled orally on January 7,
5 that no contract to lease had been entered into because
the uncertainty and indefiniteness of its essential and
erial terms (R:105-109). On this same date, the Appellant's
orney offered in open court to waive the subordination
use (R:108) and after further briefing on the waiver
stion the court below on June 14, 1965 entered its written
ision granting the motion for summary judgment (R:114-118).

On June 30, 1965, judgment was entered which, among
er things, cancelled the lis pendens filed by the Appellant
October 25, 1963 (R:119-121). On the same date, the
ellant filed its notice of appeal (R:122-123) as well as
econd notice of lis pendens (R:124-129) which notice
been subsequently cancelled by the court below by the
ision dated November 2, 1965.[1/]

1/ For the convenience of the court, the Decision is set forth in Appendix A.

ARGUMENT

I

SUMMARY OF ARGUMENT

The alleged option to lease the Appellant seeks enforce in this action includes the following paragraph:

> "Said lease shall contain the standard provisions normally contained in a lease for similar property situate in the State of Hawaii together with the provision that the Lessor shall subordinate their fee to permit the Lessee to obtain financing which provision is by way of example, but not by way of limitation." (R:9)

The meaning of the above language is that a ovision that the Appellees would subordinate their e simple interest in the real property described in e alleged option would be included in the lease together th other non-standard provisions not mentioned and t to be negotiated.

The court properly held that the subordination ause as set forth in the option to lease is necessarily essential and material term thereof and as a matter law the above subordination language is so vague, definite and uncertain that it renders the alleged tion unenforceable. A subordination clause is

aningless without the determination of the maximum
ount of the loan, the interest rate of the loan, the
riod of the loan and the purpose to which the proceeds
the loan are to be applied. In order to enforce
e alleged option with the subordination provision
cluded, a court necessarily would have to include
rms of the subordination provision which terms were
t agreed to by the parties. The court below properly
ld that, as a matter of law, it could not make such an
reement for the parties.

The Appellant's contention that it is entitled
waive the subordination provision would still require
e court's enforcement of a contract that was not agreed
on by the parties and this the court below properly
fused to do. The court below determined that a
oper subordination clause would benefit both the
ssor and the lessee since the parties contemplated
e construction of a completedstructure on the premises
be leased and the magnitude of the structure and the
ssor's reversionary interest therein were all tied to
properly negotiated subordination clause. The
pellant's waiver of an essential but not fully negotiated
rm of a contract furnishes no basis giving a remedy on
alleged contract which was not completed and hence not
nding on either party.

II

SUBORDINATION CLAUSE

Appellant's principal contention is that the language . . Lessor shall subordinate their fee to permit the Lessee obtaining financing . . ." is definite enough for specific formance of the alleged option because all this phrase means that the parties have agreed that the subordination of the ellees' fee interest will be without restrictions (Brief for ellant p.13).

This argument is invalid for two reasons: First,[1/] Appellant has lifted this phrase completely out of the con- t from the rest of the sentence in which it is used, thereby torting the obvious meaning that a provision subordinating fee would be included in the lease along with other non- ndard provisions not mentioned and yet to be negotiated, Second,[2/] as a matter of law, the subordination language is vague, indefinite, and uncertain that it renders the alleged ion unenforceable. Necessary elements of a subordination use are omitted, such as the maximum amount of the construc- n loan, the terms of the loan including when the loan would me due, the rate of interest it would bear and the manner which the loan would be paid.

Before discussing these arguments, the Appellees l review briefly the principles of law necessarily considered the court below in its oral decision (R:105-107).

1/ This argument begins on page 15 of this Brief.

2/ See pages 17-31 of this Brief.

A. Statute of Frauds

If an option to lease is so indefinite and un-
rtain in its essential and material terms because future
gotiations are contemplated between the parties, then
der the Hawaii Statute of Frauds neither an action for
ecific performance nor an action for damages can be
intained. 1/ It is a basic requirement of this Statute that
e agreement must be sufficient, that is, the agreement
st contain all the essential and material terms of the
reement.

The court below by deciding that the subordination
nguage was vague and indefinite and could not be waived
one party because it was an essential and material term
the alleged option, concluded that as a matter of law
e alleged option was insufficient under the Statute of Frauds.

49 Am.Jur. Statute of Frauds § 353 (1943), states
e applicable principle:

> "The general rule is that the memorandum, in order to satisfy the statute, must contain the essential

---

Chapter 190 Revised Laws of Hawaii 1955, as amended, provides in part:

> "Certain contracts, when actionable. No action shall be brought and maintained in any of the following cases: . . .
>
> "(d) Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them; . . .
>
> "Unless the promise, contract or agreement, upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged therewith, or by some person thereunto by him in writing lawfully authorized."

terms of the contract, expressed with such certainty that they may be understood from the memorandum itself or some other writing to which it refers or with which it is connected, without resorting to parol evidence."

The annotator in Annot., 16 A.L.R.2d 621 (1951), titled "Sufficiency of memorandum of lease agreement to tisfy the Statute of Frauds, as regards terms and condi-ons of lease" summarizes the general rule by stating:

"'The parties must have reached final agreement upon all essential terms of a valid contract, without reservation of any such term for future negotiation, and those terms must be embodied in a writing.' In other words, the memorandum relied on to establish a lease agreement must embody all the essential and material parts of the lease contemplated to be thereafter executed with such clarity and certainty as to show that the minds of the parties had met on all material terms so as to effect a complete and valid lease, with no material matter left for future agreement or negotiation." (at 624)

Similarly, the court in 1130 President Street Corp. Bolton Realty Corp., 300 N.Y. 63, 90 N.Y.S.2d 50 (Ct. p.), 38 N.E.2d 16 (1949), states the rule:

"The requirements which this agreement must meet--that it may be enforced as a contract and satisfy the Statute of Frauds--are clear in theory and not peculiar to a contract for the lease of real property. The parties must have reached final agreement upon all essential terms of a valid contract, without reservation of any such term for future negotiation, and those terms must be embodied in a writing. . . ." (38 N.E. 2d at 18)

The answer to an anticipated argument that by the e of the words "essential terms", the courts simply mean reement upon the property description, the term, the ount of rent, and the time and manner of payment, is

e following comment by the same annotator in Annot., A.L.R.2d, at 624:

> "And it should be particularly noted that although a memorandum may satisfy the statute by setting out with sufficient clarity all essential terms of a valid lease, if it goes further and shows that some other term or condition material to the lease, though not essential to a valid lease, has not been fully agreed upon by the parties but has been left for further negotiation or agreement, such additional matter may thereby render the memorandum insufficient under the statute."

e Hawaii Supreme Court in Francone v. McClay, 41 Haw. 72, -79 (1955), has recognized and adopted this view:

> "Many authorities hold that there need be only a definite agreement as to the name of the parties to the lease, the extent and bounds of the property leased, a definite and agreed term, a definite and agreed price or rental, and the time and manner of payment. Where there are these essentials and no expectation of further provisions to be negotiated later, such a contract to lease is sufficiently definite for enforcement by a decree of a court of equity. . . .
>
> "However, the important element in the cases purporting to set forth the so-called essential elements as being only the names of the parties, a description of the property to be leased, the amount of rental, the terms of payment, the term and duration of the lease, is that there is no expectation of further provisions to be negotiated later."

the same effect see:

Rosenfield v. United States Trust Co., 290 Mass. 210, 195 N.E. 323 (1935);

Blackmore-Danzig Co. v. Silsbee, 131 Misc. 340, 225 N.Y.Supp. 767 (Sup.Ct. 1927); and

H. M. Weill Co. v. Creveling, 181 App.Div. 282, 168 N.Y.S. 385 (1917), aff'd without op. 119 N.E. 1048.

B. An option to lease which is incomplete and uncertain cannot be specifically performed.

It is without dispute (1 Williston, Contracts § 37, . 107-111 (1957 ed.) that there cannot be an "offer" in e legal sense without sufficient definiteness thereof, so at upon acceptance a court is able to give the offer an act meaning. Since by definition an option is merely an fer, an option cannot be accepted unless it contains "all e terms necessary for the required definiteness." (See merous cases cited by Williston loc. cit.)

It therefore follows that contracts, which are complete and uncertain, are not capable of being specifically rformed.

25 R.C.L., Specific Performance § 17, "Certainty Contract Generally," states:

> "One of the fundamental rules respecting the specific performance of contracts is that performance will not be decreed where the contract is not certain in its terms. The terms must be complete and free from doubt or ambiguity, and must make the precise act which is to be done clearly ascertainable. A decree of specific performance may be entered where the contract is certain and complete, or contains provisions which are capable in themselves of being reduced to certainty, and from which the intention of the parties can be clearly ascertained, but such a decree will be denied if some of the terms of the contract are indefinite and uncertain or are left open for future determination by the parties."

The Hawaii Supreme Court, in Francone v. McClay, pra, recognized the general rule when it stated:

> "There is little or no conflict of authority upon the general principle that where

a contract is complete and certain as to the essential and material terms, parts and elements of a lease, specific performance will be granted; nor if the contract to lease or the negotiations of the parties affirmatively disclose or indicate that <u>further</u> negotiations, terms and conditions are contemplated, the proposed lease is considered incomplete and incapable of being specifically enforced." (41 Haw. at 78)

Similarly, in <u>Mercer v. Payne & Sons Co.</u>, 115 b. 420, 213 N.W. 813, 818 (1927), the court stated:

"The rule appears to be, as deduced from the authorities, that a court of equity will not enforce a contract, unless it is complete and certain in all its essential elements, and the parties themselves must agree upon the material and necessary details of the bargain, and if any of these be omitted, or left obscure or indefinite, so as to leave the intention of the parties uncertain respecting the substantial terms, the case is not one for specific performance. It is not the function of a court of equity to make a contract for the parties, or to supply any of the material stipulations thereof. If any of the essential details are wanting a chancellor will not supply them in a decree for specific performance. . . ."

C. Definiteness of the provisions of an option to lease is determined either on the date the option is exercised <u>or the date suit is filed.</u>

The applicable rule is stated by the court in <u>eving v. Vandover</u>, 240 Mo.App. 117, 218 S.W.2d 175, 179 949):

"'Equity will determine the enforceability of a contract as to certainty, completeness and mutuality as of the date of demand for specific performance or at the time suit is filed rather than at an earlier date.'"

e also <u>Heidner v. Hewitt Chevrolet Co.</u>, 166 Kan. 11, 199 2d 481 (1948).

D. The proposed leasing agreement would have contained a subordination clause and other non-standard provisions.

By taking the phrase ". . . Lessor shall subordinate eir fee to permit the Lessee to obtaining financing . . ." t of context and thereby excluding the modifying phrase ich provision is by way of example, but not by way of mitation", Appellant offers the tenuous argument that the rties merely intended an unrestricted subordination of the pellees' fee interest (Brief for Appellant p. 13).

Because a subordination clause is not self-executing t requires creativity (see the subordination cases starting page 20 of this Brief), the obvious and only logical con- ruction to be given to this language of the alleged option that the lease would contain "standard provisions" and on-standard' provisions, an example of a 'non-standard' ovision being a subordination provision. Nor did the rties intend to place any limitations on the number of on-standard' provisions. Other 'non-standard' provisions re intended and were expected to be negotiated during the fe of the "exclusive option". The lease would just not be mited to a single 'non-standard' provision.

On or about July 25, 1965, Mr. Frank Nunes, the lifornia attorney while in Honolulu, personally delivered the Appellees' attorney lease drafted by the law offices Nunes & Crews, 967 "B" Street, Hayward, California

:13,36,85). Although this lease contained, among others, ovisions relating to an option to purchase, an extension d an arbitration clause, the alleged option is silent on ese provisions. Thus, these provisions are either andard[1/] or 'non-standard' provisions and in light of the pellant's admissions in its Answer that this lease con- ined provisions which were neither standard nor usual ovisions normally included in Hawaiian leases (R:45), ese provisions are obviously the 'non-standard' provisions.

Appellees' position is that on the motion for summary dgment the court below had only to consider if there was genuine issue of material fact on whether the subordination ause tendered by Appellant (or any subordination clause) s or could be a standard provision "normally contained in lease for similar property situate in the State of Hawaii". e court below could and did, in effect, take judicial notice at there is no such standard clause used in Hawaii (R:106) d the syntactical structure of the Appellant's own alleged tion document supports, if it does not require this nclusion.

1/ Francone v. McClay, 41 Haw. 72, at 82 (1955), suggests what are standard or the usual and stereotype provisions contained in a lease, naming provisions relating to the payment of taxes, insurance and other charges, etc., repair, maintain fences, sidewalks, sewerage, drains, observe the rules and regulations of the board of health, keep the premises in repair, not to assign or mortgage without the consent of the lessors, etc.

The alleged option on its face not only required anticipated future negotiations between the parties on the n-standard' provisions.[1/] This being so, the alleged ion cannot as a matter of law be the basis for a claim, ce the court has nothing before it which in any manner embles a completed agreement. Since the alleged option ex- ed without the parties reaching an agreement on a lease, court below quite properly rejected the task of creating novo a leasing agreement for the parties (R:114-118).

E. As a matter of law, a subordination provision requires agreement on the conditions of the subordination.

Appellant irrelevantly argues that the court below has ed in entering judgment because the subordination clause tracted for is "clear, definite and unequivocal" and that clause contracted for is "wholly without restrictions" ief for Appellant p. 13). In effect, the Appellant is uing that the language of the option resulted in a con- ctual obligation on the part of the Appellees-lessors to ow a lien to be imposed on their fee simple title (1) for an efinite amount, (2) at an indefinite interest rate, (3) able over an indefinite period, (4) for indefinite financing

---

[1/] For cases showing that the tender of the lease in connection with an uncertain option is indicative of the necessity for additional negotiation as to material terms, see: Goldstine v. Tolman, 157 Wis. 141; 147 N.W. 7 (1914); McKnight v. Broadway Inv. Co., 147 Ky. 535, 145 S.W. 377 (1912), and Rosenfield v. United States Trust Company, 290 Mass. 210, 195 N.E. 323 (1935).

poses, (5) unrestricted as to type, kind, size and purpose
structure to be constructed, and (6) the proceeds of the
ancing from which subordination would be available without
trictions to the lessee for any purpose whatsoever. All
s the Appellant, in effect, says is embraced within the
ase "to permit the lessee to obtain financing".

To succeed in this contention, which would appear to
absurd on its face, Appellant would have to overcome two
urmountable obstacles: (1) Prove that this absurd meaning
intended by the language of the option [to do this counsel
the Appellant suggests that in some vague way by stating "in
n court on two occasions that it would provide experts to
tify at the trial of this matter that the clause had a
inite and ascertainable meaning as it stood" (Brief for
ellant p.13), this amounted to an offer of proof of facts
ch precludes the entry of summary judgment], and (2)
isfy the requirements of certainty of a contract. Appellant
ld have to prove that such a clause to be drafted and inserted
the 56 1/2 years lease was one of the "standard" lease
uses contracted for because it was contained in leases of
milar property situate in the State of Hawaii". No genuine
ue of fact is made out by this contention, and no trial is
uired by the rules of procedure to dispose of so tenuous a
ition.

It should be noted that the testimony which the
ellant refers to in Francone v. McClay, 41 Haw. 72 (1955),

testimony merely as to what are "usual" clauses speci-
ally enforced in that case. There, the contract was for
ease of income producing apartment property, with improve-
ts in place. The concept of subordination of the fee simple
le for the purpose of "financing" was not in any manner
olved.

If the vague language of the Appellant's Brief (p.13)
intended to convince this court that an expert will be per-
ted to testify as to what the phrase ". . . Lessor shall
ordinate their fee to permit the lessee to obtain financing
." means, Appellant is asking an expert to substitute his
gment on a matter of law for the judgment of the court
ow. If the Appellant intends to put on expert testimony to
ve that the subordination clause in a lease contract is a
ndard clause [no such offer of proof appears on the record],
ellant is offering to prove something which the court below
icially noticed could not be proven and which this court on
present record will not disturb.

Appellant mistakenly relies as "squarely in point"
McCarty v. Harris, 216 Ala. 265, 113 So. 233 (1927). In
t case, purchasers of real property filed a bill in equity
require the sellers to sell and convey property. The
tract contained the statement that the purchasers may put
irst mortgage on the property. The seller appealed the
ial of a demurrer, contending, among other things, that
contract was rendered uncertain because the contract did
specify the amount of the first mortgage. The court

sposed of this by holding that that provision was not
e essence of the contract to convey ". . . a mere subsidiary
rt of the agreement" (113 So. at 234). In the present case, the
urt below held, in effect, that the subordination of
e fee in a leasing transaction involving Lahaina, Maui
ach property was extremely essential and necessary for
e proper financing for the hotel-apartment project as well
protection for the value of the reversionary interest of
e Appellees, their heirs or assigns (R:105-106, and see
p.Low p.9,12).

Appellees contend that the subordination language
the alleged option is uncertain and indefinite as a matter
law.

A case squarely on point is Gould v. Callan, 127
l.App.2d 1, 273 P.2d 93 (1954). There, a buyer of property
ught specific performance of a written contract for the
nveyance of real property. The contract contained the
llowing subordination clause (273 P.2d at 94):

> "'The 2nd Trust Deed mentioned on page 1 hereof to provide for subordination on following basis: In the event the trustor [plaintiff] should erect a building on subject property at a total building cost of not less than $75,000.00 or more than $300,000.00, then Beneficiary agrees to subordinate said Trust Deed to the lien of a first trust deed not to exceed 60% of the true building cost. In the event of such subordination then the payments on said Second Trust Deed loan to be $400.00 or more per month, including 5% interest.'"

The lower court found that provision to be uncer-
in and indefinite. The appellate court, after citing the

eneral rules relating to definiteness, stated:

"The subordination provision is incomplete in its statement of the obligation to be secured by the first deed of trust. It is silent as to the amount of interest, the length of time it is to run, and the terms of payment. Gardner, a realtor who represented defendant in the transaction, testifying in behalf of plaintiff, stated that at the time the escrow instructions were executed it was understood the subordination agreement would be prepared at a subsequent date by defendant's attorney and he was to approve its final form; the length of time the new first deed of trust would be on had not been previously discussed; the terms and conditions were to be prepared in a form which would be acceptable to and insurable by the Los Angeles Title & Trust Company.

"If something is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party, by the very terms of the promise, may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise. . ." (273 P.2d at 95)

The court concluded by stating:

"The failure of the subordination clause to state the amount of interest and the terms and conditions of payment of the obligation to be secured by the first deed of trust makes the contract uncertain and indefinite. The provisions are material and essential to a contract providing for a deed of trust as security for an obligation, and their absence is fatal to the claim for specific performance. The indefiniteness, uncertainty, and absence of all of the indicated material and substantial terms of the alleged contract justified the trial court in denying specific performance." (273 P.2d at 96)

The next case following Gould v. Callan was Roven . Miller, 168 Cal.App.2d 391, 335 P. 2d 1035 (1959). This as also an action for specific performance of a contract for ne sale of real property. The "Purchase Option Contract", ong and detailed in many respects, was set forth in toto n footnote 1 appearing on pages 1037 and 1038. That

ortion of this contract referring to a subordination

ause was (335 P.2d at 1038):

> "'"This Deed of Trust will be subordinate to a First Deed of Trust to secure a construction loan which will be placed upon the property by the Trustor, or his successors and assigns, given to a recognized Savings and Loan Association or bank for the purpose of securing a loan to be used for the construction of residences and improvements on said property. Beneficiary will issue a partial reconveyance for any specific lot number covered by this Deed of Trust upon the payment to the beneficiary of a sum equal in proportion to the number of lots secured by the Deed of Trust to the original amount of the note secured hereby plus 20% for each lot reconveyed. When the balance of the note secured by this Deed of Trust has been paid in full, beneficiary will issue a full reconveyance for the property still covered by the lien of this Deed of Trust."'"

Notwithstanding the extensive details provided in

ne Purchase Option Contract, the appellate court upheld the

ower court's finding that the contract was indefinite,

ncomplete and uncertain because of the subordination clause,

elying primarily upon Gould v. Callan.

The court's holding was as follows (335 P.2d at 1040-41):

> "In the instant case the subordination clause contained in the purchase option contract does not state the amount of the construction loan which would be placed on the property, nor any of its terms, nor when said construction loan would become due, nor the rate of interest that it would bear, nor the terms or conditions of the first deed of trust to secure said construction loan. These provisions are material and essential to a contract providing for a deed of trust as security for an obligation and their absence justified the trial court in denying specific performance of the contract."

One month after the Roven case, the California

ppellate court was confronted again with a subordination

roblem in Kessler v. Sapp, 169 Cal.App.2d 819, 338 P.2d 34

959). In that case, the buyers had entered into an reement to purchase from the sellers a parcel of unimproved operty. Upon the latter's refusal to convey the property, e buyers brought an action for specific performance, where- on the sellers sought declaratory relief and a quieting title. The court affirmed the lower court's finding at the contract was too uncertain to be binding because the indefiniteness of the subordination clause:

> "'. . . The Deed of Trust securing the above described Note shall contain the following Subordination Agreement: The Beneficiary on behalf of his or her heirs, administrators and assigns hereby agree and consent that during the life of said Deed of Trust the Trustors or their successors in interest may obtain a loan from a Bank, Insurance Company, Savings and Loan Association or Mortgage Company, securing a note for construction and/or permanent financing to be secured by a deed of trust which will be and remain at all times a lien on the property herein described and superior to the lien of this deed of trust. As a matter of record only, the Seller agrees to accept the Deed of Trust securing the above described Note on subject property described as individual parcels or lots instead of acreage if the buyer has completed subdivision and obtained correct legl description describing the property by Lot and Tract. The Seller agrees to subordinate the Deed of Trust which will become a second deed of trust to a first trust deed to be filed concurrently or after close of escrow, and said first trust deed not to exceed in the amount equal to $6.50 per square foot exclusive of garages, stairways and porches.'" (338 P.2d at 36)

In 1960, the California court was again concerned th the indefiniteness of a subordination provision in an tion to purchase. In Wright v. Fred Heyden Industries, Inc., Cal.Rptr. 392 (Cal.App. 1960), the court, in responding to e question of indefiniteness of an agreement to convey

sed for the first time on appeal, held the following sub-
ination provision to be indefinite (6 Cal.Rptr. at 393-
):

"'The trust deed hereinabove provided for' the contract continued 'shall contain provisions permitting Buyer to subordinate and Owner agrees that the trust deed may, at the option of Buyer, be subordinated to loans for the purpose of improving the property covered by said deed of trust by the subdivision thereof and the construction on the lots produced as a result of such subdivision of houses and related improvements and shall further provide that upon the sale of each house and lot thus produced and improved, Owner will promptly, upon the request of Buyer, place in the escrow in which such house and lot is being sold by Buyer to a third person, a partial release of said deed of trust, which partial release shall remove from said house and lot the lien of such deed of trust, together with instructions to said escrow that such partial release may be delivered to the purchaser of such house and lot upon said escrow being able to deliver to Owner a sum equal to the full amount of the note of Buyer as hereinbefore described divided by the number of lots produced by the subdivision of the usable part thereof by Buyer.'"

The court held (6 Cal.Rptr. at 394):

"It will be noted that nowhere in the provisions quoted--and, we add, in no part of the contract not quoted--is there any statement made as to the maximum amounts of the loans, the lengths of time they may be made to run, in what manner they are to be paid, what, if any, interest they are to bear, or as to other conditions of importance in determining to what burdens the property being sold and scheduled to be held in trust to secure the buyer's obligation to the seller, is to be subjected. Provisions of subordination striking similar to the above, were under review in two fairly recent cases decided by this court: Gould v. Callan, 1954, 127 Cal.App.2d 1, 273 P.2d 93 and Kessler v. Sapp, 1959, 169 Cal.App.2d 818, 338 P.2d 34. . . ."

In Conely v. Fate, 227 Cal.App.2d 418, 38 Cal.Rptr.
3 (1964), the court held that a deposit receipt which implied
at a purchase money trust deed would be subordinated to a

ilding loan was uncertain because the receipt did not
ate what type of structure or structures would be con-
ructed on the property or the amount of the building loan,
lying on Gould v. Callan.

A recent decision on a subordination provision
Magna Development Company v. Reed, 228 Cal.App.2d 230,
Cal.Rptr. 284 (1964). There, the court was involved
th the identical question and procedure for raising that
estion which confronted the court below. The question on
peal was whether the lower court was justified in granting
notion for summary judgment. This, in turn, raised the
estion "whether a subordination clause in an agreement for
e sale of real property is uncertain as a matter of law"
9 Cal.Rptr. at 286). The appellate court affirmed the
cision of the lower court stating that (39 Cal.Rptr. at 290):

> "[W]hen something is reserved for future agreement [terms of the subordination clause] of both parties, the promise [to include the clause] can give rise to no legal obligation until such future agreement. 'Since either party, by the very terms of the promise, may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.'"

It makes no difference whether the option refers
the purchase or leasing of real property, or whether the
tter is decided outside of the State of California. The
w York court, in Kusky v. Berger, 225 N.Y.S.2d 797 (1962),
f'd without opinion, 249 N.Y.S.2d 858 (Sup.Ct., App.Div.

64), was concerned with an action seeking specific per-
rmance of an agreement to lease containing a subordin-
ion clause. There, as here, was an agreement or option
lease real property. Although the court does not set
rth in its opinion the exact language of the subordination
ause, the court stated:

> ". . . It [agreement to lease] further obligates the Lessor to subordinate the said property to a first mortgage lien to be obtained by the Lessee in an amount not exceeding specified percentages of the cost of the building depending on the maturity date of the mortgage and sets forth elaborate provisions for refinancing and ultimate termination of all real estate mortgages not later than 14 years preceding termination of the lease. It requires that any mortgage to which the lease is to be subordinated be obtained 'from a banking or Savings & Loan Association or insurance institution licensed to do business in the State of New York.' It requires that all 'mortgages after the first refinancing must be fully self-liquidating', but makes no provision at all concerning interest rate of any mortgage." (225 N.Y.S.2d at 798)

The lessees brought an action for specific perform-
ce and were met with a motion to dismiss by the lessor
ising the legal insufficiency of the complaint. In grant-
g the motion to dismiss, the following portion of the
inion is pertinent, as well as support for the decision of
e court below (225 N.Y.S.2d at 799):

> "The 'material element' omitted in Willmott was the interest and amortization to be provided in the purchase money mortgage. While no New York case has been found dealing with interest in a subordination clause, as distinct from interest in a purchase money mortgage, as the missing element, the interest rate of a mortgage to which a lease is to be subordinated would have material bearing on the lessee's ability to carry on his business, and must be

considered a 'material element,' Gould v. Callan, 127 Cal.App.2d 1, 273 P.2d 93. True, in the purchase money mortgage cases, the courts will imply that interest is at the legal rate and that the mortgage is to be payable on demand, . . . or that the mortgage is to have the same interest rate and maturity date as an existing one, . . . unless the parties by expressly leaving such missing elements to negotiation negate such implication or inference, . . . On the facts of the present case there can be no such implication or inference, however, for the mortgage is to be obtained by plaintiff or his assigns from a banking or insurance institution, a totally different situation, of course, from that of a seller taking back a purchase money mortgage. Were plaintiff's assignee a corporation, as is the normal practice in real estate transactions, there would be no legal limit on the rate of interest, . . . Having both omitted the interest rate from the subordination clause and included a right of assignment by plaintiff, the parties have created an hiatus making a specific performance decree impossible." [citations omitted]

The applicable principle of law emerging from the regoing decisions[1/] and adhered to by the court below in s oral decision (R:105-107) is that whenever an agreement fers to subordination the terms and conditions of the sub- dination clause set forth in the option must be spelled out complete and extensive detail if there is to be a binding d enforceable agreement between the parties. Accordingly,

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Appellant's futile attempt to distinguish the California cases is based on a claim that the cases turn on a California statutory provision that a purchaser of property has no personal liability under a purchase money mortgage. This point has never been raised or relied on in any of these California cases even though the courts are repeatedly confronted with the subordination cases. The minimum requirements of a subordination clause would appear to be, at least, agreement upon the maximum amount of the construction loan both as to principal and interest and a reference to what terms would be required by the lender. See Stockwell v. Lindeman, 229 Cal.App.2d 750, 40 Cal.Rptr. 555 (1964).

e court below properly held the subordination language
the present action to be uncertain, vague, and indefinite,
d thus incapable of being specifically enforced or the
sis for an action for damages.

Appellees offer the following cases to demon-
rate the rationale and reasonableness of the principle of
w recognized in the foregoing cases. The cases that the
pellees could offer in support of the rationale of the
al decision of the court below are almost numberless.

H. M. Weill Co. v. Creveling, 168 N.Y.S. 385
up.Ct., App.Div. 1917) aff'd 119 N.E. 1048 . The court
ld a memorandum vague which provided for rent at a given
ntal and then rent for "11 years at a reappraisal of 5 per
nt" on the grounds that the language underscored did not
dicate what was to be reappraised. The court also held
rtain language to improve the property to the extent of
less than $10,000.00 as indefinite and uncertain because
ere was nothing to show when this expenditure would be
de or the character of the improvement.

Palombi v. Volpe, 226 N.Y.S. 135 (Sup.Ct., App.
v. 1927, aff'd 163 N.E. 607). There, the court held that
essential term had been left open for further negotiations
a provision in an alleged contract to lease which pro-
ded for "an opening or passway through the hall of the
use." The court held this language was too indefinite
constitute an agreement because it was impossible to tell

ere the opening was to be located.

Gordon v. Siegel, 125 N.Y.S.2d 862 (Sup.Ct.), dified on other grounds, 132 N.Y.S.2d 437 (1953). In that case a morandum of an agreement for the leasing of property ferred to the construction of a supermarket building. e court held this provision indefinite and indicating e necessity of further negotiations between the parties as the size, specifications and the cost of the building. e court further held that the type and size of the structure re material since the structure was to revert to the lessor the end of the term of the lease.

American Mining Co. v. Himrod-Kimball Mines Co., 4 Colo. 186, 235 P.2d 804 (1951). In that case, the court ld a contract incomplete which provided for the payment of yalties of certain percentages of the net return on grounds at the agreement did not state the method of calculating ch percentages or the time or manner of payment.

Colorado Corp. v. Smith, 121 Cal.App.2d 374, 263 2d 79 (1954). There, the court held a provision in a ntract relating to the construction of certain residences too vague and uncertain making the entire contract unen- rceable in equity. The exact language in the agreement ld uncertain was "the buyer herein agrees to construct at ch time as he chooses residences of not less than 1200 uare feet, each on the parcels facing on Gault Street." 63 P.2d at 80)

Chatham-Trenary Land Co. v. Swigart, 220 Mich.

', 189 N.W. 1000 (1922). In that case, an agreement
vided that the defendants were obligated to pay for
00 acres of land each year. The agreement did not pro-
de a way for selecting the parcels of land to be sold.
e court denied specific performance on the basis that such
provision was ambiguous and incapable of being specifi-
ly performed, holding that the parties should have stated
early the manner of executing provisions of the contract.

Andreula v. Slovak Gymnastic Union Sokol Assembly
. 223, 138 N.J.Eq. 260, 47 A.2d 878 (1964), aff'd, 140
.Eq. 171, 53 A.2d 191 (1947). There, the court, in
nying specific performance of an agreement, held a pro-
sion in a lease providing that "the tenant herein shall
ve the first option to purchase said premises" (47 A.2d
878) as being too uncertain for failing to provide a
andard for determining price.

Sweeting v. Campbell, 8 Ill.2d 54, 132 N.E.2d 523
956). In that case, a contract relating to the financing
mortgage failed to provide for the maturity dates of the
rst and second mortgages. The court held the agreement
certain and denied specific performance of the contract.

Howard v. Beavers, 128 Colo. 541, 264 P.2d 858, 859
954). There, an agreement for the exchange of properties
ovided that one of the parties would "convey back unto the
rty of the second part a mortgage on the property hereinabove
scribed as the East 120 acres . . . for $14,800.00 . . ."
64 P.2d at 859). The court held that this language of

ıe contract concerning the terms of the mortgage made
ıe contract incomplete and therefore unenforceable.

To the same effect see:

Realty Improvement Co. v. Unger, 141 Md. 658, 119 Atl. 450 (Md.App. 1922);

Williams v. Manchester Building Supply Company, 213 Ga. 99, 97 S.E.2d 129 (1957); and

Cases cited in Annot., 60 A.L.R.2d 251 (1958).

III

WAIVER

Appellees have shown that the subordination pro-
ısion is an essential and material term of the alleged
ɔtion to lease and that the uncertainty of the clause
enders the alleged option invalid and unenforceable as a
atter of law. The Appellant argues that if the subor-
nation provision is uncertain, the Appellant is entitled
"waive" the provision thus eliminating both the subor-
nation provision and the resulting uncertainty from the
leged option.

In Magna Development Company v. Reed, 228 Cal.App.
d 230, 39 Cal.Rptr. 284 (1964) (discussed at 25, supra),
ıe court was faced with the uncertainty of a subordination
ovision in a purchase agreement coupled with willingness
f one of the parties to waive this provision in an attempt
enforce the purchase agreement (The waiver was actually
et forth in the counteraffidavit of the plaintiff to

fendant's motion for summary judgment and supporting fidavit). The court held as follows (39 Cal.Rptr. at 293):

> "Plaintiff also argues that even if the subordination clause is uncertain as a matter of law, it has eliminated the uncertainty by waiving the benefit of the clause. . . . The attempted waiver is ineffective for two reasons. . . . Secondly, if a party were permitted to waive defective provisions going to the essence of a contract, the court, in effect, would be allowing the unilateral creation of a new, different contract. A party to a contract cannot erase uncertainty therefrom by waiving such uncertainty and thereby restore its contractual validity."

milarly, in Roven v. Miller, 168 Cal.App.2d 391, 335 P.2d 1, 335 P.2d 1035 (1959) (discussed at 21, supra), where e optionee attempted to cure the defect of an indefinite bordination provision by waiver of the provision, the court ld that the option had expired prior to the offer of waiver 35 P.2d at 1041). Appellant does not cite any case involv- g the waiver of an uncertain subordination provision.

One group of cases [1] (hereinafter called

Keely v. Broadstreet Nat'l Bank, 16 F.Supp. 639 (D.N.J. 1936);

Epstein v. Kuhn, 225 Ill. 115, 80 N.E. 80 (1907);

Wright v. Houdaille-Hershey Corp., 321 Mich. 21, 31 N.W. 2d 845 (1948);

Torelle v. Templeman, 94 Mont. 149, 21 P.2d 60 (1933);

Jasper v. Wilson, 14 N.M. 482, 94 P. 951 (1908);

Prilik v. Goodman, 111 N.Y.S.2d 916 (S.Ct. 1952).

iver of performance cases) cited by the Appellant involves tuations analogous to that in Koon v. Maui Dry Goods and dcery Company, Ltd., 30 Haw. 313 (1928) (Brief for pellant p.20), where the plaintiff brought a suit for the ecific performance of an agreement for the assignment of a ase. The Hawaii court recognized that full performance of e contract could not be specifically decreed since the fendant-lessee was unable to obtain a release from a sub-ssee. The plaintiff was held to be entitled to specific rformance in part and to an abatement in the purchase price damages for defendant's failure to perform. An example such a waiver in the factual context of the instant case uld have arisen if a valid contract to lease had been eated with the terms of the subordination clause definitely t forth, and then the Appellees were unable to perform cause a pre-existing lien on the property prevented the bordination of the fee as agreed upon by the parties. The pellant then would be in a position to specifically enforce e contract to lease, waiving the Appellees' failure to mpletely perform.

The Appellant assumes throughout its brief that e alleged option to lease ripened into a valid contract n all its terms save one" (Brief for Appellant p.25), and s argument is based upon that premise. Not only is the emise thus assumed the very issue to be decided in this

se but all the waiver of performance cases cited by the pellant deal with contracts that are valid, binding and rtain in all their terms, the only problem being whether e terms are specifically enforceable or whether equity is e proper remedy.

The Appellant cites a second group of cases[1/] (hereinter called deferred payment cases) involving contracts or tions for the purchase of real property which were held ecifically enforceable by the purchaser where a provision r deferred payment was indefinite but the purchasers offered ll payment of the purchase price in cash. However, in all e deferred payment cases the waiver was either made within e time period allowed in the contract or the contract was lent as to time. In the instant case, the date of expiraon of the alleged option was August 1, 1963 and the oellees made their offer of waiver in open court 17 months ter the time to exercise the option expired, and 14 months ter their own answer and counterclaim for specific perfor-

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Morris v. Ballard, 16 F.2d 175 (D.C.Cir. 1926);

Blanton v. Williams, 209 Ga. 16, 70 S.E.2d 461 (1952);

Trotter v. Lewis, 185 Md. 528, 45 A.2d 329 (1946);

Levine v. Lafayette Bldg. Corp., 103 N.J.Eq. 121, 142 Atl. 441 (1928);

Haire v. Patterson, 63 Wash.2d 282, 386 P.2d 953 (1963);

Hubbell v. Ward, 40 Wash.2d 779, 246 P.2d 468 (1952).

nce in this action. No case has been cited or discovered
ere a court has allowed a waiver of an essential term at
ch a time.

It is the Appellees' contention that the uncer-
inty of an essential term makes the alleged option void
d unenforceable under any circumstances but, assuming for
e sake of argument that the alleged option to lease was
pable of being exercised, the question is what rights
re created in the Appellant by its delivery of notice of
ercise on July 26, 1963 (R:5,45). The only possible result
a valid exercise of the option would be an executory
lateral contract to lease binding on both parties.
wever, the Appellant even after its notice of exercise,
s never been bound to execute any lease since it has been
ee at all times to insist upon a subordination provision
which provision is by way of example, but not by way of
mitation") absolutely satisfactory to itself. In view of
e fact that the Appellant has never been bound by a promise
accept a lease granted by the plaintiffs, a bilateral
ntract binding upon both parties could not have resulted
om the defendant's exercise of the option. It seems clear
at if no bilateral contract was created by August 1, 1963,
e date of expiration of the option, the option was not
fectively accepted and is deemed rejected as a matter of

1/
w. Time is of the essence in an option which expressly
fines the duration of the offer. 1A Corbin, Contracts
273 (1963) states:

> "If the time for acceptance of an ordinary offer is expressly limited by the offeror, acceptance must take place within that time or not at all; time is of the essence. The same is true of an offer that has the form of an option contract."

In effect, the Appellant is contending that it had continuous option for an indefinite period from August 1, 963 to waive the subordination provision and accept the ffer to contract to lease without the provision, even ough such provision was necessary for the protection of essor's interests. The Appellant understandably cites no thority for such a contention.

The decisions in the deferred payment cases are sed upon the assumption that the provision being waived is benefit only to the party seeking specific performance. e Appellant admits that the subordination clause in this se might be of some benefit to the Appellees (Brief for pellant p.28), but the Appellant requests the court to ange the terms of the alleged option by eliminating the bordination clause on the grounds that the probability of nefit to the Appellees is based upon speculation. This precisely what the court in Magna Development Company v.

1/ Failure to accept during the term of the option amounts to a rejection. 55 Am.Jur. Vendor and Purchaser, p.508, § 39.

ed, supra, and the court below declined to do because the words of the court below (R:115):

> "If the waiver were here sanctioned, this court would be creating a new and different contract from that which both parties attempted to make."

e Appellant argues that unless the benefit of the subor- nation clause to the Appellees can be shown with certainty e Appellant should be allowed to waive the clause at any me.

It is obvious that the Appellees contemplated that ey would receive a benefit by having a completed structure their premises through the device of a properly negotiated coordination clause and the court below properly refused to sume that this clause was of no benefit to them. The urt below recognized that a subordination provision in lease is normally one of the factors assuring that the ased property will be developed to its highest and best e to the substantial benefit of the property owner. As ated by the court below (R:117):

> "The term of the lease was to be 56 1/2 years. If a building of x value were placed thereon, it might be completely depreciated by the time the lease expired, whereas if a building of y value were built thereon, it might still be of great value to the lessor at the termination of the lease. The difference between an x or y building might well be the difference between subordination and no subordination of the fee, and in that difference the plaintiff [Appellees] had an obvious interest and potential benefit."

The Appellant argues that the court should eliminate

e subordination provisions since the courts in the deferred yment cases eliminated terms of payment in spite of the mote possibility that the sellers could have derived some nefit from the extension of credit. With one possible ception[1/] the provisions of the contracts involved in the ferred payment cases permitted, either expressly or by plication, the cash payment of the balance of the purchase ice and the courts were not in the position of having to ange the terms of the agreements involved. The distinction s noted by the court below as follows (R:116):

> "The cases cited by the defendant [Appellant] are in accord with its contention that a vendee may waive his conditional right, which waiver, if allowed, thereafter leaves the contract an enforceable obligation within the ambit of its own terms as agreed upon by the parties."

The exclusion of the subordination provision urged the Appellant would not leave the alleged option within the bit of its own terms as agreed upon by the parties. It is teworthy that the Appellant concludes the waiver section of s brief with offering, in effect, to negotiate the terms of e subordination provision with the Appellees ("by offering waive only so much thereof as appellees desire" (Brief for pellant p.31)). The Appellees submit that negotiation of alteration as to the terms of the subordination provision exactly what the alleged option to lease contemplated, and at the summary judgment on the "illusory contract" was operly entered.

1/ See Levine v. Lafayette Bldg. Corp., 103 N.J.Eq. 121, 142 Atl. 441 (1928). The New Jersey rule is clear, however, that a belated waiver in open court as attempted in the instant case would not be tolerated. 142 Atl. at 449.

IV

AN ACTION FOR DAMAGES IN LIEU OF SPECIFIC PERFORMANCE CANNOT BE MAINTAINED UNDER THE STATUTE OF FRAUDS.

Appellant maintains that the court below erred in awarding damages to the Appellant for the breach of the leged option (Brief for Appellant pp.32-34). Under the aii Statute of Frauds, however, "no action" can be ught if the documents relied upon for the agreement are sufficient under that statute.[1/]

By contending that the Appellant is entitled to an rd of damages, the Appellant would have to concede that the leged option is not sufficiently definite or complete in terms (including, of course, the subordination clause) to specifically enforced. Since the subordination clause was essential term, a fortiori the contract did not come into stence to be the basis for a damage action.

The waiver by the Appellant[2/] of the subordination vision in order to "eliminate any possibility of difficulty h respect to damage computation" cannot now be made the basis a damage action. Appellant cannot waive an essential

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Revised Laws of Hawaii 1955, as amended, § 190. 49 Am.Jur. Statute of Frauds, § 539 states: "It is a general principle that an invalid or unenforceable contract forms no basis for an action for damages occasioned by the breach of any obligation attempted to be imposed thereby."

Brief for Appellant p.33.

m (simply for alleged ease in damage computations) and
ll have a contract remaining for a claim for damages.

The court below's determination that a proper sub-
lination clause was for the benefit of both lessor and lessee
a clear inference from the undisputed facts. The parties
templated the construction of a complete structure on the
sed premises. The magnitude of the structure and the
sor's reversionary interest in the completed structure
all tied to a properly negotiated subordination clause,
ch negotiation was also contemplated by the parties.
ellant's waiver of an essential but not fully negotiated
m of a contract furnishes no basis giving a remedy for an
eged contract which was not completed, and hence not
ding on either party.

V

LIS PENDENS CANNOT BE FILED IN AN ACTION PENDING IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII INVOLVING REAL PROPERTY.

Appellant argues that the court below also erred in
celling its notice of lis pendens filed October 25, 1963
the grounds that a lis pendens does not expire upon the
uance of a judgment but only upon the final determination
the case, including the outcome of any appeals.

A notice of lis pendens in a federal action cannot
perly be filed in a state recording office until the state
pts the necessary laws contemplated by 28 U.S.C.

1964,[1] i.e., a specific statute authorizing a notice of action concerning real property pending in a United States District Court to be recorded in the same manner as required of a notice of an action concerning real property pending in a state court.

The decision of the court below dated November 2, 1965 is disparitive of this point:[2]

> "The legislative history of the present R.L.H. 1955, Section 230-42, shows that the Senate Judiciary Committee reported on H.B. 181 of Hawaii's 1927 legislature, creating a new section of the Revised Laws of Hawaii 1925 relating to notice of pendency of action:
>
> > 'The purpose of this Bill is to require the filing in the office of the Registrar of Conveyances a notice of the pendency of any action brought in any Circuit Court [of the Territory] involving the title to real estate.' (Emphasis added.)
>
> "The United States District Court for the Territory of Hawaii had long before been established by Congress.

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[1] 28 U.S.C. § 1964 provides:

"Constructive notice of pending actions

"Where the law of a State requires a notice of an action concerning real property pending in a court of the State to be registered, recorded, docketed, or indexed in a particular manner, or in a certain office or county or parish in order to give constructive notice of the action as it relates to the real property, and such law authorizes a notice of an action concerning real property pending in a United States district court to be registered, recorded, docketed, or indexed in the same manner, or in the same place, those requirements of the State law must be complied with in order to give constructive notice of such an action pending in a United States district court as it relates to real property in such State."

[2] See also Appendix A.

"United States Senate Report No. 2131 on H.R. 7306 -- which eventually became 28 U.S.C. § 1964 -- stated:

> 'The purpose of the proposed legislation is to provide that notice of an action . . . [lis pendens] with respect to real property, pending before a United States district court, must be recorded if the State law so provides, in order to be considered constructive notice to others that such action is pending.
>
> * * * *
>
> 'The legislation contains two requirements: (1) the State law must require that notice of local suits in State courts (as distinguished from Federal courts) be registered [etc.]; and (2) the State law must also expressly authorize notice of Federal suits to be registered, indexed, etc., in the same manner as notices in State courts. These provisions . . . will not become effective within a State until it has expressly authorized such registering, . . . etc. . . . .
>
> 'In order that Federal litigants may obtain the same protection as is offered in State court actions, the bill provides that the State law authorizing the registering, etc., of Federal notices must be the same as that for registering of State notices in State court actions . . . .'

Anent the same bill, the Assistant Director of the Administrative Office of the United States Courts advised the Committee on the Judiciary of the House of Representatives:

> '[W]ith respect to notice of the institution of suits in the Federal district courts concerning real property by providing that they should not have the effect of lis pendens unless registered, recorded, docketed, or indexed as the State law provides, if in fact the State law does provide for such registering, recording, docketing, or indexing of such Federal suits.'

The Deputy Attorney General writing to the same committee also advised that committee that H. R. 7306 did not apply unless (1) the State already had a lis pendens

statute and (2) the laws of that State also provided for similar recording of notice of an action concerning real property pending before a United States district court in such State. The Assistant Secretary of the Interior, writing to the same committee, likewise advised that same committee to the same effect.

"From the legislative history of both the State and Federal acts, it becomes clear that Hawaii's lis pendens statute does not apply to suits pending in the United States district court, cf. King v. Davis, 137 Fed. 222, 240 (Cir.Ct. Va. 1905), and the registrar of the Bureau of Conveyances had neither the duty nor the legal power to accept and file the same under Section 343-47, R.L.H. 1955, since the lis pendens referred to in that section, being strictly a creature of the Hawaiian statutes, could and did refer only to cases filed in the circuit courts in the State of Hawaii."

Accordingly, the judgment cancelling the lis pendens October 25, 1963 was proper in all respects (R:119-121).

VI

CONCLUSION

For the reasons stated herein, the judgment should in all respects be affirmed.

Respectfully submitted,

J. Russell Cades

J. RUSSELL CADES

WILLIAM M SWOPE

WILLIAM M. SWOPE

Of Counsel

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Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the prepara-
n of this brief, I have examined Rules 18 and 19 of
e United States Court of Appeals for the Ninth Circuit,
l that, in my opinion, the foregoing brief is in full
mpliance with those rules.

J. Russell Cades

J. RUSSELL CADES

WILLIAM M. SWOPE

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EPH TAU TET HEW and HELEN ONA HEW, husband and wife, RGE TAN and SHIZUKO RUTH TAN, band and wife, Plaintiffs, v. LAHAINA-MAUI CORPORATION, alifornia corporation, Defendant.	CIVIL NO. 2192

DECISION ON PLAINTIFFS' MOTION TO REMOVE LIS PENDENS

Plaintiffs, owning real property on Maui, in 1963 cuted an option to lease the property to defendant's decessors in interest. Before the expiration of the ion, defendant signed and delivered to the plaintiffs a ice of exercise of the option to lease. Within one th thereafter, plaintiffs informed defendant that such ion to lease was null and void, and on August 29, 1963, intiffs filed a complaint in the State court, seeking a cellation of the option and a declaration that it was l and void. Thereafter, defendant had the case removed this court on the grounds of diversity, and on October 21, 3, filed a counterclaim seeking specific performance of ease in the form attached to the counterclaim.

On October 25, 1963, defendant, purporting to do under R. L. H. 1955 Section 230-42, recorded a notice of

e pendency of the suit, i.e., lis pendens, in the Bureau
Conveyances, State of Hawaii. A similar notice was filed
th the assistant registrar of the Land Court of the State
Hawaii under Section 342-78, R.L.H. 1955, since a portion
the land involved was registered therein.

Thereafter, ruling upon plaintiffs' motion for
mmary judgment, on June 30, 1965, this court entered judg-
nt in favor of plaintiffs and against defendant, and
dered the lis pendens removed.

Defendant gave timely notice of appeal, and on
ne 30, 1965, filed a new lis pendens in the Bureau of
nveyances. On September 9, 1965, a notice of motion to
move lis pendens, or in the alternative posting a super-
deas bond, was filed by the plaintiffs, and thereafter the
me was argued and submitted.

As indicated from the motion, the defendant has
ver filed a supersedeas bond under F.R.Civ.P. 62, in
der to obtain a stay, and admittedly is relying upon the
s pendens to effect the same result -- without cost to
e defendant.

Plaintiffs urge that a lis pendens notice of this
deral action cannot properly be filed in the Bureau of
nveyances because the State of Hawaii does not have a law
ch as is contemplated by 28 U.S.C. § 1964, i.e., a specific
atute authorizing a notice of an action concerning real
operty pending in a United States district court to be

orded in the same manner as required of notice of an
ion concerning real property pending in the State court.
intiffs also urge that the operation of the notice of
pendens filed June 30, 1965, is preventing the plaintiffs
m dealing with or developing their property as is their
ht to do after the judgment in their favor, in the
ence of a supersedeas bond. Defendant urges (1) that
s court has no power to cancel the lis pendens of June
1965; (2) that even if plaintiffs contention regarding
effect of 28 U.S.C. § 1964 were correct, all that this
rt could do would be to rule that such filing of a lis
dens was unnecessary; and (3) that notice must be filed
h the Land Court under Section 342-78, R.L.H. 1955.

The legislative history of the present R.L.H.
5, Section 230-42, shows that the Senate Judiciary
mittee reported on H.B. 181 of Hawaii's 1927 legislature,
ating a new section of the Revised Laws of Hawaii 1925
ating to notice of pendency of action:

> "The purpose of this Bill is to require the filing in the office of the Registrar of Conveyances a notice of the pendency of any action brought in any Circuit Court [of the Territory] involving the title to real estate." (Emphasis added.)

The United States District Court for the Territory
Hawaii had long before been established by Congress.

United States Senate Report No. 2131 on H.R.
6 -- which eventually became 28 U.S.C. § 1964 --
ted:

> "The purpose of the proposed legislation is to provide that notice of an action . . . [lis pendens] with respect to real property, pending before a United States district court, must be recorded if the State law so provides, in order to be considered constructive notice to others that such action is pending.
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> "The legislation contains two requirements: (1) the State law must require that notice of local suits in State courts (as distinguished from Federal courts) be registered [etc.]; and (2) the State law must also expressly authorize notice of Federal suits to be registered, indexed, etc., in the same manner as notices in State courts. These provisions . . . will not become effective within a State until it has expressly authorized such registering, . . . etc. . . . .
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> "In order that Federal litigants may obtain the same protection as is offered in State court actions, the bill provides that the State law authorizing the registering, etc., of Federal notices must be the same as that for registering of State notices in State court actions . . . ."

nt the same bill, the Assistant Director of the Adminis-

tive Office of the United States Courts advised the

mittee on the Judiciary of the House of Representatives:

> "[W]ith respect to notice of the institution of suits in the Federal district courts concerning real property by providing that they should not have the effect of lis pendens unless registered, recorded, docketed, or indexed as the State law provides, if in fact the State law does provide for such registering, recording, docketing, or indexing of such Federal suits."

Deputy Attorney General writing to the same committee

o advised that committee that H. R. 7306 did not apply

ess (1) the State already had a lis pendens statute and

the laws of that State also provided for similar record-

of notice of an action concerning real property pending

ore a United States district court in such State. The
istant Secretary of the Interior, writing to the same
mittee, likewise advised that same committee to the
e effect. 1/

From the legislative history of both the State and
eral acts, it becomes clear that Hawaii's lis pendens
tute does not apply to suits pending in the United States
trict court, cf. King v. Davis, 137 Fed. 222, 240 (Cir.
Va. 1905), and the registrar of the Bureau of Conveyances
neither the duty nor the legal power to accept and file
same under Section 343-47, R.L.H. 1955, since the lis
dens referred to in that section, being strictly a
ature of the Hawaiian statutes, could and did refer only
cases filed in the circuit courts in the State of Hawaii.
h the notice of lis pendens filed October 25, 1963,
ore the judgment was rendered in the instant case, as well
the lis pendens filed on June 30, 1965, filed after
gment in the instant case, were improperly and illegally
ed. We need, however, concern ourselves at this time
y with that filed on June 30, inasmuch as this court as
t of its judgment cancelled the first lis pendens.

Defendant also urges that inasmuch as a portion of
property affected by the instant action has been regis-
ed in the Land Court of the State of Hawaii under Section

1/ For the legislative history of H.R. 7306, see United
tes Code, Congressional and Administrative News, 85th
gress--Second Session 1958, Volume 2, pp. 3654-3658.

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Defendant urges that this court has no power to cel the lis pendens or the registry of the same with Land Court.

As was said in Dice v. Bender, 117 A2d 725, Pa. 94 (1955):

> "The contention was there, as here, that the lien upon the properties obtained by the lis pendens could not be set aside by the court. This contention indicates a misapprehension of the doctrine in question . . . . [T]he effect of a lis pendens is not to establish actual liens upon the properties affected nor has it any application as between the parties to the action themselves; all that it does is to give notice to third persons that any interest they may acquire in the properties pending the litigation will be subject to the result of the action . . . . [L]ong before the enactment of any statutory regulations on the subject, the mere pendency of a suit in equity affecting the title to real property was held, both at common law and in equity, to constitute constructive notice thereof to all the world, and the registry statutes, so far from creating the doctrine, actually limited its application by making it effective only if the action were indexed in accordance with the statutory requirements. In short, being a creature not of statute but of common law and equity jurisprudence, the doctrine of lis pendens is wholly subject to equitable principles. Thus, . . . if the operation of the doctrine should prove to be harsh or arbitrary in particular instances, equity can and should refuse to give it effect, and, under its power to remove a cloud on title, can and should cancel a notice of lis pendens which might otherwise exist.
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> "The court below undoubtedly had the inherent power to remove what was an unwarranted cloud on defendants' title . . . ."

From King v. Davis (cited by the defendant), supra 227-8, it is manifest that when a party has lost a t by fraud, accident or mistake -- particularly as here